

Before the
COMMISSION ON COMMON OWNERSHIP COMMUNITIES
Montgomery County, Maryland

In the matter of

Carl Brown
#404
9900 Georgia Avenue
Silver Spring, MD 20902,

Complainant,

v.

Americana Finnmark Condominium Association
c/o Gary Simon, Manager
9900 Georgia Avenue
Silver Spring, MD 20902,

Respondent.

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Case No. 51-11
July 26, 2013

DECISION AND ORDER

This matter was filed with the Commission on Common Ownership Communities (CCOC) on December 2, 2011. Pursuant to Chapter 10B of the Montgomery County Code, the Commission voted to accept jurisdiction of the dispute on November 7, 2012 and appointed a hearing panel. The Commission subsequently voted to refer this dispute to the Office of Zoning and Administrative Hearings (OZAH) on January 2, 2013, pursuant to Section 10B-12(d) of the Montgomery County Code to conduct a hearing and to make a recommended decision to the hearing panel.

The OZAH Hearing Examiner for Montgomery County held a hearing on the dispute on March 19, 2013 and issued a Report and Recommendation to the Commission dated April 29, 2013.

The Commission's hearing panel has carefully considered the Report and Recommendation. The hearing panel adopts the attached Report and Recommendation as its own, with the exception described below.

The Complainant, in his Complaint as well as in his discovery requests, asked to review the "Delinquency Report" without the names of the delinquent owners redacted.

The Association refused to provide this. The panel holds that under *Md. Code Real Property Ann.*, §11-116, a unit owner is entitled to examine the books and records of the Association, including the Association's delinquency reports, without redaction of the names. Redaction of names also conflicts with the Complainant's rights under the Association's governing documents to sue the Association and any of its members to enforce those documents. However, we concur that the governing documents allow, but do not require, the Association to publish the names of those of its members who are delinquent in their assessments, and we concur that the decision of the board of directors not to do so is protected by the business judgment rule.


The hearing panel hereby ORDERS:

That the Respondent shall, within 30 days of the date of this decision, make available for inspection by the Complainant its Delinquency Reports without redaction of the names involved; and it is further

ORDERED, that this case is hereby DISMISSED and Respondent's application for attorney fees is DENIED for the reasons stated in the Recommended Decision.

Commissioners Richard Brandes and Bruce Foronoff concur.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty days after the date of this Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.



Dinah Stevens
Panel Chair

**BEFORE THE MONTGOMERY COUNTY
COMMISSION ON COMMON OWNERSHIP COMMUNITIES**

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF:

Carl Brown

Complainant

Carl Brown
Roy Dickinson
Jose Contreras
Gary Simon

For the Complainant¹

v.

AMERICANA FINNMARK CONDOMINIUM, INC.

Respondent

Gary Simon

For the Respondent
Matthew Tidball, Esquire.
Attorney for the Respondent

CCOC Case No. 51-11
(OZAH Referral No. 13-03)

Before: Lynn A. Robeson, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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¹ Mr. Dickinson, Mr. Simon, and Mr. Contreras are listed as witnesses for the Complainant, because they appeared at his request. Mr. Simon appeared both at the request of the Complainant and Respondent.

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APPENDIX

I. SUMMARY OF ISSUES AND CONCLUSIONS

The Complainant in this case, Mr. Carl Brown, a unit owner in the Americana Finnmark Condominium, Inc. (Condominium or Americana) complains that the method employed by Americana to estimate its annual expenses is inaccurate and does not eliminate redundant expenses that may occur from year to year. While not phrased this way, this gravamen of the Complaint is whether the Board's use of the "historical trend" method used by the Board to estimate the expenses included in its annual budget is within Board's authority. Specifically, Mr. Brown complains that, "[T]he budgets—over the last 5 years including the 2012 budget—were adopted without analyzing actual expenses to determine which expenses were routine and can be expected to continue, and discarding those expenses that are unlikely to repeat." Exhibit 1, p. 4.

Mr. Brown also complains that the Condominium's financial record-keeping is improper because it violates Article XV, Section 2 of the By-Laws, which requires that: "[B]ooks and accounts of the Condominium shall include books with detailed accounts, in chronological order, of receipts and of the expenditures affecting the condominium project and its administration." *Id.* Specifically, Mr. Brown believes that the financial records violate this provision because, "[T]he identification of services and goods is not available in the books." Exhibit 20, p. 3. After reviewing the evidence and testimony in this case, the Hearing Examiner rephrases this issue as follows: Whether the Condominium must produce a year-to-date general ledger which includes a detailed description of each expense within the ledger.

Finally, Mr. Brown contends that Americana failed to produce certain documents requested in discovery. In particular, these documents include the "2011 and 2012 YTD

General Ledgers” and a copy of the complete “Delinquency Report” which contains personal information identifying unit owners who are delinquent in paying their monthly assessments. Exhibit 41.

The Respondent requests the CCOC to award attorney’s fees pursuant to *Montgomery County Code*, §10B-13(d). It alleges that the Complaint is frivolous because Mr. Brown’s sole motivation was to have the property manager compile a year-to-date ledger without charge.

Because the Hearing Examiner concludes that the “business judgment rule” governs the Board’s adoption of its annual budget and because the evidence demonstrates that the “historical trend” method is an established method of budgeting used by homeowners and condominium, the Hearing Examiner finds that the Condominium acted within its discretion when it used this method to develop its annual budget.

Nor does the Hearing Examiner agree with the Complainant’s assertion that Americana’s record-keeping violates the By-Laws; the evidence demonstrates that receipts and expenses are recorded chronologically and in detail, although not in a “year-to-date” format and perhaps not as conveniently accessible as Mr. Brown desires.

As to the discovery dispute, the Hearing Examiner denied Mr. Brown’s Motion to Compel production of a 2011 and 2012 year-to-date general ledger in the format he desires. Americana does not keep a “year-to-date general ledger”, but does keep documents which provide the same information, which were made available to Mr. Brown. While Americana has the ability to generate such a document using its accounting software system, the Hearing Examiner finds that it is not required to do so either in discovery or under the Maryland Condominium Act (Act). *See, Md. Real*

Property Art., §§11-101, *et. seq.* Finally, the Hearing Examiner agrees with Americana that it need not include the names of unit owners delinquent in paying their assessments in the “delinquency report” provided to Mr. Brown. The Act vests in the Board the discretion to withhold this information and the information is not germane to the Complaint.

As to the Respondent’s request for attorney’s fees, the Hearing Examiner finds there is insufficient evidence to demonstrate that Mr. Brown’s intentions in bringing this suit were solely motivated by the desire to obtain computer-generated reports free of charge.

II. STATEMENT OF THE CASE

On January 3, 2013, the Montgomery County Commission on Common Ownership Communities (CCOC) referred this matter to the Office of Zoning and Administrative Hearings (OZAH) for a hearing pursuant to §10B-12(e) of the Montgomery County Code. Exhibit 2. The record in this case reveals that, prior to the referral to OZAH, Americana requested mediation of the dispute. Exhibit 13. The Complainant agreed to mediation but only if the discovery issues could be resolved. Exhibit 14. As these were not resolved prior to the public hearing in the case, the parties did not pursue formal mediation.

In November and December, 2012, the parties served discovery requests on each other. The record before referral reveals that Mr. Brown filed Interrogatories, a Request for Production of Documents, and a Request for Subpoenas on November 20, 2012. Exhibits 4-6. On December 13, 2012, he filed a Motion to Compel the Respondent to

produce the documents he requested, contending that he had received no response from the Condominium. Exhibit 19.

After referral, the Hearing Examiner invited the Complainant to renew the pending Motion to Compel Production of Documents to clarify the status of discovery between the parties. Exhibit 26. Specifically, she requested Mr. Brown to outline whether and which records had been made available and in what way the production remained insufficient. Mr. Brown responded that he had still not received copies of the “2011 and 2012 YTD General Ledgers..” Exhibit 30(a), p. 1. He also requested that copying charges for the documents be waived and that Americana “produce a CD of all 2011 and 2012 payment records including invoices – alleged to be electronically filed—to be chronologically [sic] within accounts by year.” *Id.*

When requested by the Hearing Examiner to clarify further which documents had not been produced, Mr. Brown supplemented his original response by listing “the complete Overpayment and Delinquency Report.” *Id.* Mr. Brown also filed an Amended Request for Production of Documents requesting the general ledgers for 2013 as well.

The Condominium responded by opposing Mr. Brown’s renewed Motion to Compel and filing a Certificate of Discovery (Exhibit 32(d)), attaching its responses to Mr. Brown’s Interrogatories and Request for Production of Documents. Americana had mailed these directly to Mr. Brown on December 18, 2012. Exhibits 37(e) and (f). The Condominium served its own Interrogatories on the Complainant, to which the Complainant timely responded. Exhibit 16(b), 20. In response to Mr. Brown’s Amended Request for Production of Documents, the Condominium filed a “Motion to Strike”, asserting that pursuant to COMCOR 10B.06.01.04(e), any request for production

of documents had to have been made within 15 days of the CCOC's jurisdictional decision. Exhibit 37(a).

The Hearing Examiner scheduled a pre-hearing conference for February 12, 2012, which all parties attended. She did not issue the subpoenas requested by Mr. Brown because the Condominium voluntarily agreed to have these witnesses available at the public hearing.²

Shortly thereafter, she issued a Notice of Hearing and Scheduling Order directing the parties to submit a Pre-hearing Statement on or before March 4, 2013, directing the Condominium to make its records available to Mr. Brown by March 4, 2013, and scheduling a public hearing for March 19, 2013. Exhibit 40. She received an e-mail from the Complainant confirming that the parties had agreed to meet and review the Condominium's financial records on February 19, 2013. Exhibit 41(a), p. 2. Subsequent correspondence from the parties confirmed that Mr. Brown did appear at the management company's office to review Americana's records, although he continued to assert that the records he requested had not been produced. Exhibit 41(a).

Both parties timely filed a Pre-Hearing Statement meeting the requirements set forth in the Scheduling Order (Exhibits 42 and 43). Three days before the public hearing, Mr. Brown requested a continuance of the public hearing because he had not received the "electronic stored format" of the Condominium's books "for ease of mapping" and because electronically stored records are "easier to access and copy and far less expensive to produce." Exhibit 47. The Hearing Examiner responded that the

² Initially, Americana asserted that its Treasurer, Mr. Jose Contreras, would not be available for the hearing and offered to have him supply written questions to questions submitted by Mr. Brown. Mr. Brown agreed to this arrangement. Exhibit 45. Ultimately, Mr. Contreras did appear and testify at the public hearing at Mr. Brown's request. T. 100-101.

discovery matters would be decided at the public hearing, and that additional hearings would be scheduled if necessary. *Id.* The public hearing proceeded as scheduled, with all witnesses requested by Mr. Brown in attendance.

III. SUMMARY OF EVIDENCE

A. Discovery Dispute

Resolution of the discovery dispute before the public hearing was perhaps hampered by the different nomenclature used by the parties to describe documents requested and by Mr. Brown's initial belief that he need not pay for copies of the documents produced.³ (T. 41; *see, e.g.*, Exhibit 1, p. 60). His Request for Production of Documents (Exhibit 4) asked for the following:

1. All 2011 and 2012 purchase orders and invoices, arranged in chronological order within accounts, to correspond to their original entry within accounts in the books/ledgers.
2. All 2011 and 2012 automated reports including YTD general and sub ledgers.
3. 2011 and 2012 budget reports.
4. All 2011 and 2012 minutes.

The Condominium's response to Mr. Brown's request for production of documents invited him to review the records at the management company's business office and to pay a cost of \$.20 cents per page. Exhibit 33(e). The record of this case

³ Section 2A-7(b)(1) of the County Code, which governs the conduct of pre-hearing discovery in CCOC cases, provides: "Any party shall have the right to review at reasonable hours and locations *and to copy at its own expense* documents, statements or other investigative reports or portions thereof pertaining to the charging document to the extent that they will be relied upon at the hearing or to question the charging party or agency personnel at reasonable times on matters relevant to the appeal, provided such discovery is not otherwise precluded by law." (Emphasis supplied). State statutory law permits condominiums to charge a reasonable copying fee, not to exceed \$0.25 per page for copies made by individuals requesting condominium records. *Md. Real Property Art.*, §11-116(d)(2); *Md. Courts and Judicial Proceedings Art.*, §7-202.

contains a lengthy series of e-mails between the parties attempting to arrange a meeting to review Americana's records both at the end of 2011 and after the pre-hearing conference in this case; it also reveals that Americana did prepare a 66-page 2011 year-to-date general ledger with supporting expense details. Both Mr. Brown and Mr. Simon, Americana's property manager, acknowledge that Mr. Brown refused to pick up the report because he did not wish to pay \$16.50 for the copies, although Mr. Brown later explained that the report was bound with tape and he was not able to select the copies he desired.⁴ T. 17-19; Exhibit 37(g). Once advised of his obligation to pay for the copies, Mr. Brown continued to insist that the Condominium provide year-to-date expense information on a CD and that the ledger contain a description of each expense.

Testimony at the public hearing and evidence submitted demonstrates that the Condominium's paper "books" include multiple financial records.⁵ To obtain a chronological list of all expenses with a detailed description of those expenses, one must cross-reference several separate files. The Condominium issues a "Monthly Statement" to the Board of Directors. This includes an income statement, balance sheet, receipts statement, cash disbursement report, a delinquency report, and a general ledger for the financial (i.e., monthly) period. T. 44-46; Exhibit 1, p. 99. The monthly expenses are listed in the statement by account code, which also includes a separate year-to-date statement of expenses by account code. Account codes are numbers assigned to particular

⁴ Mr. Brown's exact response was, "[F]orget about any charge of \$16.50, just provide the documents as I requested." Exhibit 1, p. 60.

⁵ *Merriam-Webster (Online)*, lists the relevant definition of "books" as follows: "e : a record of a business's financial transactions or financial condition —often used in plural <the *books* show a profit>." The American Heritage Dictionary defines "books" as follows: "a. A volume in which financial records are recorded. b. Such records collectively." *The American Heritage Dictionary* (Second College Edition, 1982).

categories of expenses. For instance, all expenses relating to “boiler maintenance” may be listed under the account code “58080.” Exhibit 54. The monthly general ledger itemizes expenses by vendor, account code and check number. The Condominium does not compile a “year-to-date” general ledger for expenses, which according to Mr. Simon is an unusual record for a condominium association to keep. T. 41-48.

Detailed documentation for each expense is kept separately and organized in a single file by vendor name (“Expense Documentation File”).⁶ Expense information in this file includes a copy of the invoice or contract under which payment is made and a copy of the check. Thus, in order to obtain a detailed description of each coded expense listed in the Monthly Statement, one must cross-reference the vendor’s name and check number listed in the monthly ledger with the vendor name and check number in the Expense Documentation File. T. 48.

As noted, there is no “year-to-date” general ledger kept in the Condominium’s ordinary course of business. To find the total *amount* expended during the fiscal year under a particular code, one must (1) look at the year-to-date total in the last Monthly Statement for that fiscal year or (2) add the expenses listed for that code in each Monthly Statement. To obtain a detailed description for all expenses in an account code for the fiscal year, one must cross-reference the check number and vendor name listed for the account code in each monthly general ledger with the same information in Expense Documentation File.

⁶ An “Expense Documentation File” is not a term of art; rather, it is employed by the Hearing Examiner merely to simplify the summary of the financial records in this Report.

In addition to the paper account records, the management company uses a software accounting system known as Jenark. This system has the ability to generate reports on year-to-date expenses, which incorporates the vendor name, account number, and check number. When creating a report using Jenark, all of the checks listed under an account code will appear on the screen. The system enables the user to click on the checks listed and see the documentation for the expense (i.e., the invoice or contract, check number, and vendor). T. 53.

According to Mr. Simon, the management company limits access to the Jenark system to particular employees based on job function. The management company does not permit even their auditors to have access to Jenark because if something happened to the system, it would require a tremendous amount of work to restore accurate information. Expense information included within the Jenark database is redundant of the paper documentation kept separately. T. 53-54.

Mr. Simon explained that Mr. Brown has received year-to-date ledgers in prior years (generated by the chief financial officer using Jenark), although this practice had "become a nuisance." T. 42. Mr. Brown submitted pages from several of these year to date ledgers at the public hearing and testified that, in 2006, he requested the year-to-date general ledger and was told that the Condominium did not produce year-to-date ledgers, they produced only monthly ledgers. In later years, beginning in 2007, he received year-to-date ledgers from the Condominium. T. 136. A copy of one page of the 2008 year-to-date ledger is shown on the following page.

Mr. Simon explained that the management had printed out year-to-date ledgers from the software voluntarily in prior years, but these records are not kept in the normal

8:45 AM

General Ledger
0350 AMERICANA FINNMARK
For Dates 01/01/2008 to 12/31/2008

Page:53

All Accounts				COMSOURCE MANAGEMENT INC			
Account	Type	Reference	Date	Description	Debit Amount	Credit Amount	Balance
	ACK	F0 -013483	07/14/2008	US AQUATICS, INC.	545.00		
	ACK	F0 -013497	07/25/2008	M B LANDSCAPING	650.00		
				MGMT			
	ACK	F0 -013499	07/25/2008	US AQUATICS, INC.	175.00		
	ACK	F0 -013501	07/28/2008	US AQUATICS, INC.	650.00		
	AVD	F0 -013497	07/28/2008	VOID CHECK F0 13497		650.00	
	ACK	F0 -013525	08/13/2008	US AQUATICS, INC.	84.01		
	ACK	F0 -013643	10/09/2008	US AQUATICS, INC.	275.00		
	ACK	F0 -013684	10/27/2008	US AQUATICS, INC.	816.00		
				Account Total	8,307.96	650.00	7,657.96
				Ending Balance			7,657.96
56050				Beginning Balance			0.00
	ACK	F0 -013488	07/22/2008	LIVINGSTON FIRE	1,300.00		
				Account Total	1,300.00	0.00	1,300.00
				Ending Balance			1,300.00
56750				Beginning Balance			0.00
	ACK	F0 -013219	03/20/2008	DURON PAINTS & WALLC	237.83		
	RCP	00892453	08/07/2008	RM Cash Proc Post		125.08	
	ACK	F0 -013524	08/13/2008	H. M. SWEENEY CO., IN	31.65		
	ACK	F0 -013524	08/13/2008	H. M. SWEENEY CO., IN	128.90		
	RCP	00900897	09/23/2008	RM Cash Proc Post		125.08	
	RCP	00906372	10/24/2008	RM Cash Proc Post		250.16	
	RCP	00910949	11/21/2008	RM Cash Proc Post		125.00	
	RCP	00912985	12/04/2008	RM Cash Proc Post		125.08	
	ACK	F0 -013816	12/23/2008	HEIDI HARRIS	20.31		
				Account Total	418.69	750.40	-331.71
				Ending Balance			-331.71
56900				Beginning Balance			0.00
	ACK	F0 -013485	07/22/2008	NEXIMAGE	799.00		
				Account Total	799.00	0.00	799.00
				Ending Balance			799.00
58020				Beginning Balance			0.00
	ACK	F0 -013207	03/19/2008	BOLAND SERVICES	311.40		
	ACK	F0 -013606	09/18/2008	W.W. GRAINGER, INC.	240.33		
				Account Total	551.73	0.00	551.73
				Ending Balance			551.73
58080				Beginning Balance			0.00
	ACK	F0 -013428	06/24/2008	HURLEY COMPANY	1,877.65		
	ACK	F0 -013579	09/12/2008	BOILER & FURNACE	5,449.07		
				CLE			
	ACK	F0 -013619	09/24/2008	HURLEY COMPANY	547.00		
	ACK	F0 -013619	09/24/2008	HURLEY COMPANY	547.00		
	ACK	F0 -013619	09/24/2008	HURLEY COMPANY	547.00		
	ACK	F0 -013619	09/24/2008	HURLEY COMPANY	547.00		
	ACK	F0 -013619	09/24/2008	HURLEY COMPANY	547.00		
	ACK	F0 -013621	09/24/2008	SOUTHERN UTILITIES C	288.53		
	ACK	F0 -013706	11/13/2008	CENTRAL	125.08		
				WHOLESALERS			
				Account Total	10,473.33	0.00	10,473.33
				Ending Balance			10,473.33
58100				Beginning Balance			0.00
	ACK	F0 -013208	03/19/2008	CENTRAL	387.77		
				WHOLESALERS			
	ACK	F0 -013246	04/08/2008	CENTRAL	88.20		
				WHOLESALERS			
	ACK	F0 -013247	04/08/2008	CENTRAL	591.13		
				WHOLESALERS			
	ACK	F0 -013251	04/08/2008	W.W. GRAINGER, INC.	158.93		
	ACK	F0 -013251	04/08/2008	W.W. GRAINGER, INC.	60.67		
	ACK	F0 -013284	04/17/2008	CENTRAL	520.86		
				WHOLESALERS			
	ACK	F0 -013350	05/23/2008	CENTRAL	455.35		
				WHOLESALERS			
	ACK	F0 -013351	05/23/2008	CENTRAL	21.00		
				WHOLESALERS			
	ACK	F0 -013384	06/13/2008	CENTRAL	27.96		
				WHOLESALERS			

course of business. T. 85. Periodically, he does provide individual owners with electronically-generated records if there is a specific need on a non-recurring basis.

According to Mr. Simon, generalized requests for a myriad of financial documents create a burden on him and his staff. Because of this, he requires a unit owner to review personally the paper financial records if there is a request for mass production of many financial records. They may copy anything that is legally mandated. Mr. Simon testified that the records used for the Condominium's financial audit are identical to the ones used for the budget, although reviewed for different purposes. T. 85-97.

The record is replete with evidence that Mr. Brown was offered the opportunity to inspect the financial records of the condominium and in some instances, did do so. Exhibits 1, pp. 38-86, 41(a). The Condominium did compile a year-to-date general ledger for 2011, along with the detailed documentations supporting the expenses. Both Mr. Brown and Mr. Simon agree that Mr. Brown refused to pick this up, although Mr. Brown later explained that the report was bound and he was not able to select which pages he wished to copy. T. 12, 58-59. Mr. Brown contends that he does not wish to total the expenses listed in each monthly general ledger because he is afraid he will make a mathematical mistake. T. 24. In his opinion, Americana has the ability to create a year-to-date record and therefore, they should use this ability. He finds the Monthly Statements kept by the Condominium "almost useless." *Id.*

Mr. Simon testified that the Condominium supplied Mr. Brown with the same delinquency report provided to the Board of Directors, with personal information which could identify the delinquent unit owners redacted from the report. T. 59-60. Mr. Brown

continues to assert, however, that he should receive an unredacted Delinquency Report, based on language requiring this in the By-Laws. T. 5.

B. Method of Estimating Annual Expenses

Mr. Brown also challenges the Condominium's method of developing its annual budget because, according to him, it does not scrutinize individual itemized expenses incurred in the preceding year to determine whether the expense is likely to occur again in the next fiscal year. Because of this, he believes, the Condominium is not able to analyze which expenditures may be redundant or unnecessary.

Mr. Simon testified that the Board employs the "historical trend" method of developing an annual budget and described how the Condominium prepares its annual budget. Preparation for the annual budget begins in June or July (the Condominium's fiscal year is the calendar year). Documentation includes the year-to-date expenses by account code, year-to-date income, and anticipated year-end income and expenses. The documentation also includes 3-4 years of past income/expense information for the account codes shown in the budget. T. 55-56.

The Condominium estimates the expenses for the upcoming fiscal year based on historical trends in preceding years. Mr. Simon testified that he gets the historic information from the prior statements for each financial period. T. 76. He may average the past years by either mean or median. If on average he has spent \$3,000 a year in a particular category, he believes that it is prudent to budget for that amount unless a replacement fund is scheduled for the near future. T. 77.

Mr. Simon testified that the historical trend method of budgeting will reveal management inefficiency. If one sees certain categories of expenses deviate from the historical norm, one should examine the reason and question whether they need a replacement program rather than a maintenance program. If a replacement program is needed, the Board may reallocate income from an operating account to a reserve fund. T. 57. The historical trend method allows one to identify the amount spent in certain expense codes every year and base the estimated need for the future year on the that trend. Mr. Simon gave the following example: If one coded 17 expenses to roof repair and actual expenses in the last several years had been roughly between \$15,000 and \$20,000, prudence would dictate the Condominium should budget \$15,000 for the coming year. T. 58.

Mr. Simon disagreed with Mr. Brown that it is necessary to know the "inventory" of supplies on hand in any given year. The historical trend data gives information on prior year's consumption. If they used \$500 for light bulbs last year, they would budget that for this year as well. If the Condominium bought more light bulbs than needed in the prior year, averaging the expenses over a series of years will reflect that, or it will appear as an aberration in that year. T. 78-79.

According to Mr. Simon, the "historical trend" method of estimating annual expenses is the standard method used by most homeowners and condominium associations, as well as many industries. The alternative "zero-based" method of budgeting requires construction and deconstruction of every line item to its root components. This requires an examination of every item purchased during the year and an independent estimation of what would be needed for the next year. This is very

complicated and requires a lot of time and oversight that most volunteer Boards do not wish to undertake. T. 56. In his opinion, were this method used, there would no longer be a volunteer Board. T. 58.

Mr. Brown questioned Mr. Simon on whether it had been necessary to include certain expenses in the budget, such as the "general operating expense fund."⁷ The Condominium's auditor recommends that the Condominium keep 10-20% of their assessment level in this fund to cover unbudgeted expenses. An "unbudgeted expense" might include unanticipated snow removal costs during a particularly snowy winter. Without this fund, the Condominium would either have to borrow from a reserve fund or specially assess the unit owners. T. 61-62. He disagreed with Mr. Brown's assertion that the Condominium didn't need this fund in years when revenues equaled expenses because it would not be available for unanticipated expenses in the coming year. T. 63.

He acknowledged that the fund could be used to pay expenses written off as "bad debt" and therefore, the Condominium wasn't required to have a separate expense item for bad debt. In his opinion, however, failure to budget for a reasonable expectation of loss because you have a surplus defeats the purpose of a surplus. T. 65-66. He testified that the general operating expense fund has been in place since the inception of the Condominium. T. 69. The fund has been described as the excess or loss of revenue over time. If in year 1 there is a \$1,000 deficit, and in year 2 there is a \$1,000 surplus, the general operating fund equals \$0. If you begin a fiscal year in a deficit, then the additional money owed at the end of the year would have to come from a reserve fund.

⁷ The Hearing Examiner does not find that the issue whether particular expenses should have been budgeted within the scope of the Complaint. The Complaint challenged the method used by the Board to estimate annual expenses and not whether particular expenses should have been budgeted. Should the Commission disagree with this, however, the Hearing Examiner includes a summary of the evidence on these matters.

After several years of responsible budgeting, Mr. Simon stated, there should be a sufficient amount in the fund to avoid having to contribute to the fund from assessments. T. 70-71.

In response to Mr. Brown's inquiry as to why the Condominium should separately budget for bad debt, Mr. Simon replied that, as a professional in the industry, he would advise the Board that a prudent organization should budget for an anticipated expense on an annual basis. He likened this to saving for his children's college: If he knows that his children will go to college, it is prudent to budget for it rather than to take it out of his retirement funds. T. 74-75.

Mr. Contreras, treasurer of the Condominium, testified that he conducted the budget meetings for FY 2012 and 2013 budget preparation. T.117. Mr. Brown participated in those meetings for the FY 2011, 2012, and 2013 budgets. T. 118. The budget committee is a sub-committee of the Board of Directors and is open to all owners. Mr. Brown has participated as an owner-member of the Committee. T.119. At the first meeting, material provided by Mr. Simon includes a draft budget, a narrative for each line item that summarizes historical trends or contains other information that may be relevant to that line item. T.120. They usually receive the first draft budget in June, and the meetings begin in the third quarter. After receiving the recommended draft budget, his job is to correlate the expenses with the narrative and if he has questions, to discuss them with Mr. Simon. T. 121. He looks at what items they have ended up in the red or black for, reserve studies, and information from engineering staff. He presents this information to the owners during the course of the budget meetings. They propose a budget at one meeting and then adopt it at a second meeting. T. 122.

Mr. Contreras testified that, because he is the treasurer, he is able to review the unredacted delinquency report, which he understands may not be released to the public in its entirety under federal law. T. 124. He also produces his own document based on the detailed historical data that he has compiled (over the past five years) that supplements what Mr. Simon provides. He then puts his summary of the budget together with the rest of the documents that are distributed to the ownership. T. 124. According to Mr. Contreras, there are no documents which he sees that unit owners do not see, except the unredacted delinquency report. T. 127.

When asked by Mr. Brown whether he had sufficient documents to answer all his questions about the budget, Mr. Contreras answered that he had some questions of Mr. Simon. He asked for justifications and wanted more detail from Mr. Simon on some of the expenses. T. 129. He believes that at the end of the budget process, most unit owners understood what they were voting for and were pleased with the outcome. T. 129. Mr. Contreras testified that he receives expense information from the monthly financial reports; he sometimes questions Mr. Simon's estimates or wants to know why Mr. Simon budgeted a certain way. T. 131. After these discussions with Mr. Simon, Mr. Contreras produces a summary of the entire budget, what the issues were, and what items need to be reviewed. T. 131-132. This includes an educational section, a purpose clause, and an explanation of certain items that need review, such as the volatility of certain line items that are hard to predict. T. 132. He attempts to clarify that the budget is only an estimation of costs, not a commitment that the money will have to be spent. He believed that the budget report for 2012 was fairly comprehensive because they had to increase the

assessments. T. 133. This document was available at the Board meeting with the final draft budget was proposed as well as the meeting where the budget was adopted. T. 133.

C. The Condominium's Financial Records

The structure of the Condominium's financial records has already been described in Section II.A. Mr. Brown believes that these records should be provided in a format that makes it easier to ascertain year-to-date expenses with a detailed description of the Condominium's expenses incorporated with the information and that this is required under the By-Laws. T. 95. In addition, Mr. Brown states that it is necessary to know the names of the unit owners who are delinquent in their assessments in order to evaluate the Condominium's anticipated expenses.

III. FINDINGS AND CONCLUSIONS

A. Merits of the Case

Decisions and actions of the Board of Directors of a condominium's Council of Unit owners are regulated by the Act, by the Condominium's governing documents, and by Maryland case law. Provisions of the Act control over anything to the contrary in a Condominium's governing documents. *Md. Code Real Property Ann.*, §11-124.

The Hearing Examiner found no Maryland case explicitly addressing whether the "reasonableness standard" or the "business judgment rule" should be applied to a Board's method of estimating future expenses and income for the purpose of adopting its budget. The CCOC, however, has held that Board decisions relating to a condominium association's budget are governed by the business judgment rule. *See*, CCOC Case No. 04-07, *Kauffman v. The Kenwood Condominium* (October 4, 2007) (Board's decision that

operating budget shortfall was a “net shortage” permitting special assessment under the By-Laws was governed by the business judgment rule.) As the Hearing Examiner finds that this is not inconsistent with State law, she applies the business judgment rule to the facts of this case, as articulated by the *Fox Hills* court:

This rule requires the presence of fraud or lack of good faith in the conduct of a Condominium's internal affairs before the decisions of a board of directors can be questioned . . . [I]f the corporate directors' conduct is authorized, a showing must be made of fraud, self-dealing or unconscionable conduct to justify judicial review. This presents an issue of law rather than of fact . . . Although directors of a Condominium have a fiduciary relationship to the shareholders, they are not expected to be incapable of error. All that is required is that persons in such positions act reasonably and in good faith in carrying out their duties . . . Courts will not second-guess the actions of directors unless it appears that they are the result of fraud, dishonesty or incompetence." (citations omitted). *Black v. Fox Hills North Community Condominium*, 90 Md. App. 75, 82 (1992)

The critical questions in this case, therefore, concern whether the following actions fall within the protection of the business judgment rule: (1) Americana's use of the “historical trend” method to estimate expenses included in its annual budget, and (2) its method for keeping its financial records. Because the Hearing Examiner answers this questions in the affirmative, she recommends that the Complaint be dismissed.⁸

1. Method Used to Estimate Future Expenses

The Act mandates that condominiums adopt an annual budget that includes the following categories:

⁸ Section 10B-8(5)(E) of the Code excludes from the Board's jurisdiction “the exercise of a governing body's judgment or discretion in taking or deciding not to take any legally authorized action.” Thus, if the Board's actions fall within the scope of the business judgment rule, the Complaint should be dismissed. See, *The Staff's Guide to the Procedures and Decisions of the Montgomery County Commission on Common Ownership Communities*, pp. 28-29 (November, 2012).

- (1) Income;
- (2) Administration;
- (3) Maintenance;
- (4) Utilities;
- (5) General expenses;
- (6) Reserves; and
- (7) Capital items.

Md. Real Property Art., §11-109.2. A proposed budget must be submitted to the unit owners at least 30 days before adoption and the budget must be adopted at an open meeting of the Board. *Id.* Thus, while the Act requires that anticipated income and categorized expenses be included in the budget, it does not dictate the method used to estimate those items for the coming fiscal year.

Neither the Master Deed nor the By-Laws mandate that the Condominium adopt a budget *per se*. Exhibit 3. Article IX, Section II of the By-Laws does, however, require unit owners to pay, on a monthly basis, their proportionate share of the Condominium's expenses, "*as estimated by its Board of Directors...*" Exhibit 3, By-Laws, p. 13 (emphasis supplied). Thus, the By-Laws vest the Board with the discretion to decide how to estimate its annual expenses to determine the amount of its assessment. The Act requires that this estimate of expenses be included in an annual budget.

The Hearing Examiner finds convincing Mr. Simon's testimony that the "historical trend" method of estimating future income and expenses is a standard method used in many industries (and particularly by homeowners and condominium associations) and is an efficient way of estimating future expenses. While Mr. Brown argues that the Condominium must know all of its "inventory" or supplies on hand at the end of the fiscal year to avoid redundant expenses, the evidence demonstrates that this is not the

case. Averaging prior year's expenses in particular expense categories eliminates redundant purchases because an unnecessarily large purchase in a prior year will be offset by lower costs in subsequent years. This method also reveals trends that may determine whether operating expenses for certain maintenance items are increasing, thus signaling the need to shift that expense to a replacement or reserve fund.

Nothing in this record indicates that the Board's decision to use of the "historical trend" method to develop the Condominium's budget was in bad faith. The testimony demonstrates that the alternative method of estimating future expenses, the "zero-based" budget method, is time-consuming and requires a great deal of oversight; the Hearing Examiner finds credible Mr. Simon's statement that, were this method used, "he would no longer have a volunteer board."

While not necessarily part of the original complaint, Mr. Simon's testimony defending particular items in the budget (i.e., the "bad debt" and "contribution to general operating fund") also supports the Board's good faith in adopting a prudent budget, even though this meant an increased assessment on the unit owners. Were these not separately expensed, the Board could end the fiscal year in a deficit, necessitating either borrowing from a reserve fund or a special assessment to resolve a budget shortfall.

While Mr. Brown does not challenge the Board's compliance with the procedural requirements of the Act, the Hearing Examiner finds that Mr. Contreras' testimony supports a finding that the Board's actions were in good faith and otherwise met these requirements. Development of the Condominium's budget occurred in numerous meetings over the course of several months. Some of these meetings were conducted by

a sub-committee of which Mr. Brown was a member. Mr. Contreras' testimony establishes that the adopted budget was the product of active dialog between the Board and the management company and that the Board complied with all notice requirements in the Act.

2. Financial Records

The Act requires Americana to keep its financial records, "in accordance with good accounting practices on a consistent basis." ⁹ *Md. Real Property Art.*, §11-116(a). The Condominium's By-Laws (Article XV, Section 2) similarly require the Condominium to keep its books and accounts "under the direction of the Treasurer in accordance with good accounting practices consistently applied." Exhibit 3, By-Laws, p. 28. The By-Laws further mandate that.

The same shall include books with detailed accounts, in chronological order, of receipts and of the expenditures affecting the condominium project and its administration and shall specify the maintenance and repair expenses of the general and limited common elements and services and any other expenses incurred. *Id.*

As noted, the Condominium's paper "books" include multiple financial records.¹⁰ Collectively, these records do meet the requirements of the By-Laws. The Monthly Statements are issued chronologically to the Board of Directors at the close of each financial period (i.e., each month). While the detailed documentation for each expense is

⁹ This section of the Act also requires the Condominium to compile its financial statement and deliver it to a unit owner who has requested it in writing within 21 days. As noted, the Condominium's financial statements are issued monthly and were not the subject of Mr. Brown's request. Rather, Mr. Brown has requested Americana to affirmatively produce a document in a particular format which does not exist, but which must be created by staff of the management company. *Id.*, §11-116(c)(1)(ii). For this reason, the Hearing Examiner finds that the requirement to compile and provide a financial statement does not apply to Mr. Brown's request for the year-to-date ledger.

¹⁰ *Merriam-Webster Dictionary (Online)*, lists the relevant definition of "books" as follows: e : a record of a business's financial transactions or financial condition —often used in plural <the *books* show a profit>.

kept separately, it is possible to obtain this information by using the general ledger included in each Monthly Statement. Testimony also reveals that auditors use these documents in the regular course of performing their financial audits, thus demonstrating that the records are kept in a manner acceptable by accounting standards.

Mr. Brown asserts the “books” of the Condominium should be a single document listing expenses in chronological order with a description of the detailed documentation for each expense. Because this type of report is available if one of the management company employees generates a report through Jenark, he believes it should be provided. This report is not, however, produced in the normal course of the Condominium’s business; rather, it must be created by management company staff. Mr. Simon contends that responding to generalized requests for a large number of financial records is time-consuming and a burden on staff.

The business judgment rule, which governs the internal operating affairs of the Condominium, vests in the Board the discretion to determine its method of keeping the Condominium’s financial records and whether to mandate that management staff utilize the Jenark system to produce reports. The evidence demonstrates that the records are kept in a manner consistent with the Act and the Condominium’s By-Laws. As indicated, nothing in the record demonstrates that the Condominium has acted in bad faith. For these reasons, the Hearing Examiner finds that the Board’s actions fall within the scope of the business judgment rule and that the Complaint should be dismissed.

B. Discovery Dispute

The Hearing Examiner denied Mr. Brown's discovery motions primarily because the information requested requires the condominium to generate a document that does not exist. T. 100. This finding is explained in more detail here.

Interrelated federal, State, and County laws, and Executive Regulations govern disclosure of records to parties in a CCOC dispute. These laws fall into three categories: (1) laws mandating disclosure of certain documents, (2) laws prohibiting disclosure of certain documents, and (3) laws and regulations governing discovery.

The Act requires condominium associations to make their records available for inspection by the unit owners. *Md. Real Property Code Annot.*, §11-116. It also vests with associations the discretion to withhold certain records. Records which may be withheld include: "An individual's personal financial records, including assets, income, liabilities, net worth, bank balances, financial history or activities, and creditworthiness." *Md. Real Property Code Annot.*, §11-116(c)(3)(iii). Condominium associations may assess a "reasonable charge" for copies of the records.¹¹ *Id.*, *Md. Courts and Judicial Proceedings Code Annot.*, §7-202.

Respondent raises "concerns" that disclosure of an unredacted delinquency report, including the names of delinquent unit owners, is prohibited by the Federal Fair Debt Practices Collection Act, 15 U.S.C.A. §1692 (FDPCA), and the Maryland

¹¹ Currently, State law limits copying charges to \$.50 per page for copies made by the Association and \$.25 per page for copies made by individuals. *Md. Courts and Judicial Proceedings Code Annot.*, §7-202. In this case, the Condominium requested that Mr. Brown pay \$.25 per page for copies of the computer-generated 2011 Year-to-Date General Ledger and offered to provide copies of documents identified discovery for \$.20 per page.

Consumer Debt Collection Act (MCDCA), *Md. Commercial Law Code Annot.*, §14-201, *et. seq.*. These are addressed more particularly in the following section.

The County's APA and Executive Regulations govern discovery in CCOC disputes. The APA gives a party the right to review and to copy at its own expense, "documents, statements or other investigative reports or portions thereof pertaining to the charging document to the extent that they will be relied upon at the hearing or to question the charging party or agency personnel at reasonable times on matters relevant to the appeal, provided such discovery is not otherwise precluded by law." *Montgomery County Code*, Art. 2A-7(b)(1). Executive Regulations add some additional requirements, listed below:

(3) The inspection must take place at a reasonable and convenient time to both parties.

(4) Copies of documents selected by the requesting party at the inspection must be provided by the responding party to the requesting party at the requesting party's expense within five (5) days of the inspection. COMCOR 10B.06.01.04(b).

1. 2011 and 2012 Year-To-Date General Ledgers

The Hearing Examiner finds that Mr. Brown has been offered the opportunity to review all of the Association's records that are kept in the normal course of business. These include the Monthly Statements as well as the corresponding Expense Documentation File. The record contains repeated offers from the Condominium to make the records available for his review and demonstrates that, at times, Mr. Brown did attend meetings to review these financial records, although he continued to assert that the records were not forthcoming. The Hearing Examiner finds that Mr. Brown's

dissatisfaction with the records produced does not stem from being denied access or a failure of discovery. Rather, his discontent stems from the format of the Association's "books", which he finds difficult to negotiate. He looks longingly to the "year-to-date" ledger that may be generated by the management company's software accounting system, which can search the Association's financial records to create a year-to-date ledger. He also insists that a detailed description of the expense should be incorporated into the year-to-date ledger which should be available in a searchable CD format.

The Hearing Examiner concludes that Mr. Brown's desire, while understandable, falls outside the scope of the disclosure requirements in the Act and the discovery requirements in County law. This is because, to fulfill his request, the Condominium must *create* a document that does not exist. By their terms, the Act and the APA require the Condominium to permit owners to review their existing records; they do not require the Condominium to produce or create a report in the format that is most desirable to a unit owner.

While not technically applicable to this case, such a request under the Maryland Rules of Civil Procedure would yield a similar result. Those Rules require a party to produce only what is in their "custody and control." *Md. Rules of Civil Procedure*, Rule 2-402. While this includes access to electronic records, it still does not affirmatively require a party to generate a record that does not exist. Moreover, the Rules do not create an absolute right to view electronic records that already exist; provision of these may be limited where burdensome or difficult. The Hearing Examiner finds reasonable the management company's position that unit owners may not individually use the database,

thus requiring staff time to generate and copy year-to-date reports with the accompanying detail of expenses.

2. Delinquency Report

Mr. Brown also argues that Americana must release the full delinquency report, including the names and unit numbers of the owners who are delinquent in paying their assessments because of the following provision in the By-Laws:

The Board of Directors *may* post a list of members who are delinquent in the payment of any assessments or other fees which may be due the Corporation, including any installment thereof which becomes delinquent, in any prominent location within the condominium's project. Exhibit 3, By-Laws, Article IX, Section 4, pp. 13-14 (emphasis supplied).

There is little in the By-Laws to indicate the purpose of this provision, nor have the parties provided a rationale as to its purpose. Mr. Brown asserts that this provision is intended to ensure transparency in the Board's operations.¹² T. 6.

Respondents raise "concerns" that publication of such a document or release of identifying information on the unit owners would violate the FDCPA and the MCDCA, but did not extensively brief the issue. Nor did Mr. Brown respond to Americana's concerns. Therefore, the Hearing Examiner undertook her own analysis of this.

Respondents are correct that the FDCPA does prohibit publication of a list of consumers who "allegedly refuse to pay debts" except to certain entities. 15 U.S.C.A. §1692(d). Federal District Courts disagree, however, to what extent the FDCPA applies to condominium assessments. Contrary to some of Americana's concerns, a Maryland

¹² Article VII, Section 1 of the Condominium's Master Deed suggests that individual owners may enforce any covenant or restriction set forth in the Deed, which would include the responsibility of each unit owner to pay the Condominium assessments. Exhibit 3, Master Deed, p. 4. There is no evidence in this record whether this section of the By-Laws is intended to further that ability.

federal district court recently held that condominium associations seeking to collect assessments are not third-party debtors regulated by the FDCPA if they bill for past due payments before default . *Fontell v. Hassett*, 870 F. Supp. 2d 395, 402 (Md. 2012); *see, generally, Condominium Law and Practice: Forms*, §45.15 (Matthew Bender & Company 2013). Aside from whether associations and their management companies are “debt collectors”, federal courts disagree whether condominium assessments are “consumer debt” within the meaning of the federal act, although the trend appears to consider these assessments covered by the FDCPA. *See, Condominium Law and Practice*, §45.15[3] (“It appears that majority opinion is that condominium assessments are debt under the FDCPA”). While the Hearing Examiner does not consider federal law definitive on whether disclosure is prohibited, she does acknowledge that the law is in flux on this issue.

Of possibly greater concern is Maryland’s Consumer Debt Collection Act, which is not limited by its terms to third-party debt collectors: “‘Collector’ means a person collecting or attempting to collect an alleged debt arising out of a consumer transaction. *Md. Commercial Law Code Annot.*, §14-201. The MCDCA prohibits collectors from disclosing, “information which affects the debtor’s reputation, whether or not for credit worthiness, with knowledge that the other person does not have a legitimate business need for the information.” *Commercial Law*, §14-202.

The Hearing Examiner found no Maryland federal or State court cases directly holding that the MCDCA applies to condominium assessments, although two Maryland

decision appear to assume tangentially that this is the case.¹³ Courts in other jurisdictions have interpreted similar State statutes to apply to condominium assessments because the definition of “debt collector” is not restricted solely to third-party debtors. *See, e.g., Wright v. Bush Ross, P.A.*, Case No. 8:07-cv-1885-T-23MAP, 2008 U.S. Dist. LEXIS 4012 *4 (M.D. Fla. 2008).

The Hearing Examiner finds it unnecessary to resolve whether these statutes *prohibit* disclosure of the unredacted delinquency report because the Maryland Condominium Act gives the Board discretion to withhold personal information on unit owners’ “liabilities” and “creditworthiness.” Certainly, a delinquent assessment constitutes a personal financial liability or monies owed to the condominium. Similarly, the term “creditworthiness” may be defined restrictively as referring to individual’s credit rating or more broadly as whether an individual is capable of repaying a debt. *Compare, Merriam Webster’s Dictionary (online)* (“Creditworthiness” defined as, “[F]inancially sound enough to justify the extension of credit”); Webster’s II New Riverside University Dictionary (Houghton Mifflin Company 1984) (“Creditworthy” defined as “[H]aving an acceptable credit rating”).

The Hearing Examiner does not agree with Mr. Brown’s that the By-Laws require the Board to post a list of delinquent unit owners. Rather, the By-Laws state the Board “*may*” do so; whether to do so is left to the discretion of the Board. Because the Board’s decision *not* to disclose the identity of delinquent unit owners is authorized by the Act

¹³ In *McKlveen v. Monika Courts Condominium*, 208 Md. 369 (2011), the Court of Special Appeals considered only whether a counterclaim filed by the defendant unit owner under the FDCPA and MCDCA should be counted in determining whether the amount in controversy entitled the defendant to a jury trial. Similarly, the *Fontell* court held that a unit owner’s MCDCA claims had not been properly preserved and, alternatively, that the MCDCA governed only the methods used to collect a debt, but were not a defense to the debt itself. *Fontell*, 870 F. Supp. 2d at 405.

and not prohibited by the governing documents, it comes within the scope of the business judgment rule. There is no evidence here that the Board has displayed any bad faith; in fact, the flux in judicial decisions relating to application of the FDCPA and MCDCA supports the Board's concerns about releasing this information.

As these records are not required disclosures under the Act or the By-Laws, Mr. Brown may only obtain these records through discovery. The APA limits discovery, however, to documents "pertaining" to the Complaint. What Mr. Brown has failed to do throughout this proceeding is to demonstrate *why* personal identification of delinquent unit owners is relevant to his challenge to the Board's method of estimating future expenses. Mr. Brown has been provided with a redacted copy of the Delinquency Report showing the amount of the delinquencies that could affect the budget; he has not demonstrated that the identities of those delinquent in paying their assessments have any relevance to the Board's budget process.

C. Attorney's Fees

The County Code permits a CCOC panel to award attorney's fees a party:

- (1) filed or maintained a frivolous dispute, or filed or maintained a dispute in other than good faith;
- (2) unreasonably refused to accept mediation of a dispute, or unreasonably withdrew from ongoing mediation; or
- (3) substantially delayed or hindered the dispute resolution process without good cause.

Montgomery County Code, §10B-13(d).

To support its claim for attorney's fees, the Condominium argues that Mr. Brown's sole purpose in bringing his Complaint was to obtain the most convenient form

information on the Condominium's expenses free of charge. T. 142-143; Exhibit 37(c), p. 5.

The Hearing Examiner finds that there is insufficient evidence to find that Mr. Brown acted solely for this reason. The Hearing Examiner agrees with Respondent that Mr. Brown did initially believe he need not pay for the records. After being instructed to the contrary by the Hearing Examiner, he later acknowledged that he was required to pay. T. 17-19. He also testified that he refused to pay for the 2011 year-to-date general ledger and expense documentation because it was bound with tape and he wasn't able to pick which pages he wanted to copy. *Id.* Testimony also demonstrates that the Condominium did give Mr. Brown year-to-date general ledgers for the years 2007-2010 free of charge. T. 11-12. This practice may have encouraged Mr. Brown to assume that it would continue and was required.

While the Hearing Examiner agrees that part of Mr. Brown's complaint stems from the fact that the computer-generated report is more convenient to work with than the paper financial records, she does not find from the evidence that this was Mr. Brown's sole motivation in filing the Complaint. Throughout the course of his questioning members of the Condominium's Board and Mr. Simon, he asked substantive questions on whether the budgeted expenses could have been lower or budgeted differently, and whether the witnesses believed that the budgeted expenses were necessary.

For these reasons, the Hearing Examiner recommends denial of the Respondent's request for attorney's fees.

IV. RECOMMENDATION

For the foregoing reasons, the Hearing Examiner recommends that the Complaint in this case be *dismissed*, as the actions of the Board of Directors fall within the scope of the business judgment rule, and that Respondent's request for attorney's fees be *denied*.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Lynn Robeson', written over a horizontal line.

Lynn Robeson
Hearing Examiner

Dated: April 29, 2013

APPENDIX

Summary of Testimony

1. Mr. Gary Simon:

Mr. Simon described how the Association's accounts are kept and the documents provided to Mr. Brown. Mr. Brown was given the same documents that the Board of Directors and the auditors receive.

The Association provides a Monthly Statement to the Board. This statement includes an income statement, cash disbursement report, a delinquency report, and a general ledger, which organizes expenses by account number. He testified that, in layman's terms, the general ledger is like a checkbook; it lists all expenses by account code and shows the name of the vendor. The income statement shows the source of income and the account code where credited and expenses by account code. The Monthly Statement also includes a page where year-to-date income and expenses are listed. According to Mr. Simon, if you see an expense code listed, you may cross check this in the ledger to see exactly what the expense is for.

Mr. Simon stated that, in order to do a complete financial review, one must use both the monthly general ledger and the income and expense statement. T. 48. Documentation supporting each expense is placed in an accordion file organized by vendor name; the documentation will include a copy of the check, an invoice, or a copy of the contract for which the payment is made. T. 48.

The general ledger for each financial period (i.e., one month), will show what vendors were paid, the check number, and the total amount of the expense for that period. Mr. Simon gave an example: If Apple Plumbing was paid \$400, the general ledger will show the check number, invoice number and vendor. You then go to "A" in the vendor

file and match the invoice and check numbers. While the expense codes are not described on the general ledger (i.e., maintenance), they are described on the monthly income statement.

According to Mr. Simon, these are the records used by their auditors to perform the audits of the books. They do not have a "year-to-date" general ledger. Mr. Brown was provided with all of these documents for the dates requested. T. 58. These included the same monthly statements provided to the Board for the months of January, 2011, through December, 2012. It also included corresponding invoices for expenses paid listed in each statement. T. 58-59. Mr. Brown was also provided with a copy of the prepaid and delinquency report with any personal information with which one could identify an individual's delinquent redacted out. T. 59.

In addition to the paper accounts, the management company has a software account system known as Jenark (phonetic spelling). Using Jenark, one can search for expense account codes by date and all of the checks under that account will appear on the screen. The system enables the user to click on the checks listed and see the documentation for the expense (i.e., the invoice or contract, check number, and vendor). The Board receives the same information on a monthly basis. T. 53.

Mr. Simon testified that CMI does not permit their auditors access to Jenard because if something happened to the system, it would require a tremendous amount of work to restore accurate information. He does not have full access to the system; access to CMI employees is based on job function. Everything in the software system is redundant of the paper documentation kept separately. T. 53-54. Auditors review the

paper documentation independently and there are auditors in CMI's office almost every day for one of CMI's clients (i.e., homeowners or condominium associations). T. 54.

Mr. Simon described how the Association prepares its annual budget. Preparation for the annual budget begins in June or July (the Association's fiscal year is the calendar year). Documentation includes the year-to-date expenses by account code, a year-to-date income ledger, and anticipated year-end income and expenses. The documentation also includes 3-4 years of past income/expense information for the line items shown in the budget. T. 55-56.

The Association budget is based on historical trends. According to Mr. Simon, this is the standard method of budgeting for homeowners and condominium associations as well as most industries. The other method of budgeting, the zero-based method, is very complicated and requires a lot of time and oversight that most volunteer Boards do not wish to undertake. T. 56.

The historical trend method will reveal management inefficiency. If one sees certain categories of expenses deviate from the historical norm, one should examine the reason and question whether they need a replacement program rather than a maintenance program. If the latter is the case, this requires reallocation of some income from an operating account to a reserve fund. T. 57. The historical trend method allows one to identify the amount spent in certain expense codes every year and base the estimated need for the future year on the that trend. He gave the following example: If one coded 17 expenses to roof repair and actual expenses in the last several years had been roughly between \$15,000 and \$20,000, prudence would dictate that a budget of \$15,000 for the coming year would be pretty safe. T. 58.

According to Mr. Simon, the zero-based method of budgeting requires construction and deconstruction of every line item to its root components. This requires an examination of every item purchased during the year and an independent estimation of what would be needed for the next year. In his opinion, were this method used, there would no longer be a volunteer Board. T. 58.

Mr. Brown questioned Mr. Simon on several budget line items. He requested Mr. Simon to explain the account entitled, "general operating expense fund." Mr. Simon testified that this is a fund for operating surplus or excess. The Association's auditor recommends that the Association keep 10-20% of their assessment level in this fund to cover unbudgeted expenses. An "unbudgeted expense" might include unanticipated snow removal costs during a particularly snowy winter. Without this fund, the Association would either have to borrow from a reserve fund or specially assess the unit owners. T. 61-62. He disagreed with Mr. Brown's assertion that the Association didn't need this fund in years when revenues equaled expenses because it would not be available for unanticipated expenses in the coming year. T. 63.

He acknowledged that the fund could be used to pay expenses written off as "bad debt." In his opinion, however, failure to budget for a reasonable expectation of loss because you have a surplus defeats the purpose of a surplus. T. 65-66. He testified that the general operating expense fund has been in place since the inception of the Association. T. 69. The fund has been described as the excess or loss of revenue over time. If in year 1 there is a \$1,000 deficit, and in year 2 there is a \$1,000 surplus, the general operating fund equals \$0. If you begin a fiscal year in a deficit, then the additional money owed at the end of the year would have to come from a reserve fund.

After several years of responsible budgeting, Mr. Simon stated, there should be a sufficient amount in the fund to avoid having to include contributions to the fund from the assessment. T. 70-71.

In response to Mr. Brown's inquiry as to why the Association should budget for bad debt when then have the general expense contribution fund, Mr. Simon replied that, as a professional in the industry, he would not advise the Board that it shouldn't avoid the decision to expense bad debt because of the existing of the fund. If there is an anticipated expense, in his opinion, a prudent organization budgets for it on an annual basis. He likened this to saving for his children's college: If he know that his children will go to college, it is prudent to budget for it than to take it out of his retirement. T. 74-75.

Mr. Simon acknowledged that, to determine a historical trend, the historical expenses must be based on accurate data. He gets the historic information from the income statements for each financial period. T. 76. He may average the past years by either mean or median. If on average he has spent \$3,000 a year in a particular category, he believes that it is prudent to budget for that amount unless a replacement fund is scheduled for the near future. T. 77.

Mr. Simon disagreed with Mr. Brown that it is necessary to know the "inventory" of supplies on hand in any given year. The historical trend data gives information on prior years consumption. If they used \$500 for light bulbs last year, they would budget that for this year as well. If the Association bought more lightbulbs than needed in the prior year, averaging the expenses over a series of years will reflect that, or it will appear as an aberration in that year. T. 78-79

Mr. Simon explained that the management had printed out year-to-date ledgers from the software voluntarily in prior years, but these records are not kept in the normal course of business. T. 85. He acknowledged that it is a normal part of their business practice to make electronic duplicative copies for the documentation of expenses. T. 88. He did not provide these because Mr. Brown does not have access to the computer software system; Mr. Simon did provide Mr. Brown with the hard copies of the business records normally kept. T. 89. They do permit individual owners to use the software. Typically, if someone comes in with a specific request, such as the 2012 landscape contract for the Association, he would e-mail it to them. If the request is just a broad request for all records, he does not permit the person to access the database. If there a multiple requests for database searches, it becomes a burden to he and his staff to have to continually run those searches. T. 91. He generally runs the searches and it is a significant time from his day to keep running searches. T. 92. If there was a specific need on a non-recurring basis, he tries to accommodate individuals as best he can. T. 93. When there is a request for mass production of a myriad of financial documents, he insists that the owner come in, review them as they are compiled for public dissemination, and they may copy anything that is legally mandated. T. 93. Mr. Simon testified that the records used for an audit are identical to the ones used for the budget, although reviewed for different purposes. T. 97.

On re-direct, Mr. Simon testified that there is no correlation between an item being budgeted and having the money to pay for it. T. 99.

2. Mr. Roy Dickinson:

Mr. Dickinson testified that he doesn't recall what Mr. Brown referred to as the "AF planning worksheet." T. 107. He admitted that he had served on the facilities planning committee with Mr. Brown before he was on the Board of Directors. T. 106. He agreed that one issue the committee had looked at was whether there should be more detailed documentation of expenses before planning for future expenditures. T. 108. Mr. Brown showed him a spreadsheet of detailed expenses, alleging that Mr. Dickinson has prepared the chart. Mr. Dickinson indicated that it looked like his work. T. 108. He stated that he gained the information for the spreadsheet from the checks and invoices kept by the Association. T.110. He had no idea that the information was kept anywhere else. T. 110. The Chairman of the committee had obtained the information and he put it together into a spreadsheet. T. 110. He recalled that three or four people had worked on this. T. 111.

In response to additional questions from Mr. Brown, Mr. Dickinson testified that they get information whether additional reserve funds are necessary by performing a reserve study. 113. The person performing the study has to look at the expense of replacing various items and then projects what annual amount is necessary to fund the replacement. T. 113. That amount is included in the budget. They received a draft study in 2012 and several members had questions on it. There were some adjustments made and then a second and final report was issued. T. 115. There was an open meeting on the reserve study, but Mr. Dickinson did not recall if there was an open meeting with the reserve analyst. T. 116.

3. Mr. Jose Contreras:

Mr. Contreras serves as treasurer for the Association. Mr. Contreras testified that he conducted the budget meetings for FY 2012 and 2013 budget preparation. T.117. Mr. Brown participated in those meetings for the FY 2011, 2012, and 2013 budgets. T. 118. The budget committee is a sub-committee of the Board of Directors. It is open to all owners and he has admitted Mr. Brown as an owner-member of the Committee. T.119. At the first meeting, material provided by Mr. Simon includes a draft budget, a narrative for each line item that summarizes historical trends or contains other information that may be relevant to that line item. T.120. They usually receives the first draft budget in June, and the meetings begin in the third quarter. After receiving the recommended draft budget, his job is to correlate the expenses with the narrative and documentation and if he has questions, he discusses them with Mr. Simon. T. 121. He has compiled his own spreadsheet that tracks historical trends back to 2005, although Mr. Simon provides three-years of historical trends. He looks at what items they have ended up in the red or black for, reserve studies, and information from engineering staff. He presents this information to the owners during the course of the budget meetings. They propose a budget at one meeting and then adopt it at a second meeting. T. 122.

Mr. Contreras testified that as treasurer, he sees information that other unit owners do not see. The financial records are open to everyone, as are the reserve studies. He is, however, able to review the unredacted delinquency report, which it's his understanding cannot be released to the public in its entirety under federal law. T. 124. He also produces his own document based on the detailed historical data that he has compiled that supplements what Mr. Simon provides. He then puts his summary of the budget together

with the rest of the documents that are distributed to the ownership. T. 124. He had access to the expense invoices, but did not bring them to the budget meetings. T. 126. He testified that there are no documents except the unredacted delinquency report, that he has access to that unit owners are not also able to see. T. 127.

When asked by Mr. Brown whether he had sufficient documents to answer all his questions about the budget, Mr. Contreras answered that he had some questions that he had of Mr. Simon. He asked for justifications and wanted more detail from Mr. Simon on some of the expenses. T. 129. He believes that at the end of the budget process, most unit owners understood what they were voting for and were pleased with the outcome. T. 129. Mr. Contreras testified that he receives expense information from the monthly financial reports; sometimes he questions Mr. Simon's estimates or wants to know why Mr. Simon budgeted a certain way. T. 131. After these discussions with Mr. Simon, he produces a summary of the entire budget, what the issues were, and what items need to be looked at. T. 131-132. This includes an education part, a purpose clause, and an explanation of certain items that need review, such as the volatility of certain line items that are hard to predict. T. 132. He attempts to clarify that the budget is only an estimation of costs, but not a commitment that the money will have to be spent. He believed that the budget report for 2012 was fairly comprehensive because they had to increase the assessments. T. 133. This document was available at the Board meeting with the final draft budget was proposed as well as the meeting where the budget was adopted. T. 133.

4. Mr. Carl Brown:

In Mr. Brown's opinion, the paper records do not provide an easy way to ascertain the expenses in each budget code. T. 95. Mr. Brown testified that the reason he submitted this complaint was that he didn't see any way to track the expenditures listed in the budget. He thought that he could trace these expenditures listed in the budget through the books. He believes that for a budget, whether a personal budget or the Association's budget, it is important to know the actual expenditures and not just an account. This information doesn't necessarily have to be in the budget, but it's important to be able to trace back the line items to the actual expenses. This is because the budget results in a tax on individual unit owners. When he tried to trace this back from the budget in a manner that correlates with "the books", which the By-Laws require the Association to keep and hold open to the unit owners. T. 134-135. He was told in 2006 that they did not have year-to-date ledgers because they produced monthly ledgers. Then in 2007 and 2008, he received year-to-date reports without asking for them. T. 136. After he started learning what reports were produced, he realized that the ledger is produced sort of like a budget because account numbers organizes it. These line items are then totaled and included in the budget. T. 137. The problem is that the ledgers don't list what the expenses actually were. He wanted to know the services and goods that made up the expenditures. He couldn't tell simply by looking at a vendor, because the vendor could supply items in different account codes. T. 137. When he asked, he was told that numerous items were "the books" of the corporation and the term "the books" didn't have a definition. T. 138. He doesn't feel that the word "books" as used in the By-Laws contemplated the different documents that have to be cross-indexed. T. 138.

This is why has asked in his Request for Production of Documents that he be provided records using the software system, which enables one to track itemized expenditures by account code. T. 139. He believes that there is no tie-in between the paper documents. T. 139. In his opinion, under State law and Article 10B of the County Code, they have the ability to search and they should provide that. T. 140. He believes that the budget was improperly adopted because there is no way to tie in the budget expenditures codes with the actual expenses. T. 142.